

## Rising Star: WilmerHale's Felicia Ellsworth

By **Steven Trader**

*Law360, New York (April 7, 2016, 11:39 PM ET)* -- WilmerHale partner Felicia Ellsworth has notched a win in the Supreme Court for Pom Wonderful, helped Cisco Systems wipe out a \$74 million verdict in the Federal Circuit and fought fiercely in the courts for same-sex marriage rights, making the 37-year-old a clear choice to be named among Law360's top trial lawyers under 40.

Before convincing the Federal Circuit that Cisco didn't infringe on a networking patent owned by Commil USA Inc. or persuading the high court to allow Pom Wonderful's Lanham Act lawsuit against Coca-Cola to proceed, the Rising Star began honing her skills as a trial attorney first as a clerk in the First Circuit, then under the guidance of Supreme Court Chief Justice John Roberts. But with major wins already in just under a decade of practice, it's clear she's found her voice in the courtroom.

"I think it's important, and really critical, to have the judges believe that they can respect and believe you," Ellsworth said. "You need to be able to admit when you're wrong, or admit that if the facts fell a certain way, that you could not prevail. ... You need to know when to give and when to stand strong. Having the confidence to admit when you are wrong or when you would lose I think is a very important piece of growing as a lawyer and becoming a successful advocate."

A Texas federal jury had twice decided that Cisco infringed on Commil's patent before Ellsworth took the helm in 2011, and she persevered in late December by getting the Federal Circuit to toss the \$74 million verdict, even after the Supreme Court ruled in May that a good-faith belief that a patent is invalid is not a defense to induced infringement, vacating the Federal Circuit's initial 2013 decision in her favor.

But the high court's conclusion settled only a procedural question, Ellsworth said, and didn't really change her focus that the evidence showed the Texas jury was simply wrong, she said.

"We kind of circled the wagons and realized we still had these great substantive noninfringement arguments we had raised that the Federal Circuit had previously declined to reach, so we moved pretty quickly to get back in front of the Circuit, and happily they ruled in our favor," Ellsworth said.



Ellsworth took up Pom's deceptive marketing and unfair competition lawsuit against Coca-Cola shortly after a California federal judge in early 2013 concluded that Pom's claims were preempted by U.S. Food and Drug Administration regulations. The case reached the high court in mid-2014, where Ellsworth says her team tried to focus more on the big-picture argument that Lanham Act claims and FDA labeling rules can coexist, which the Supreme Court agreed with in June 2014 and let Pom's lawsuit proceed.

"As is so often a useful approach, particularly on appeal, is to try and simplify the issues as much as possible to have the court understand what is really at stake and what the first principle decision is that you're asking them to make," Ellsworth said. "People can often get bogged down in details, and those are important, but to try and distill that down to its essence and make it as clear as possible in your briefing and oral presentation is the challenge of appellate work."

Within a year of joining WilmerHale in 2008, Ellsworth was pegged to help the Massachusetts commonwealth challenge the constitutionality of the federal Defense Of Marriage Act, the first of its kind in the nation, and the trial attorney jumped at the chance, helping craft the initial complaint that ultimately survived a First Circuit appeal.

As the Supreme Court considered a DOMA challenge in *U.S. v. Windsor* in 2013, Ellsworth authored an amicus brief on behalf of dozens of government officials suggesting the law be nixed. She supported challenges to same-sex marriage bans by the Gay & Lesbian Advocates and Defenders through briefings in at least five federal circuit courts, and finally through an amicus brief on behalf of 303 high-profile conservatives who urged the high court to allow freedom of marriage in *Obergefell v. Hodges* last year.

It's been some of the most rewarding work of her career, Ellsworth said.

"For me, not only did I want to see it through, but I felt compelled to see it through," Ellsworth said. "I'm very proud to be a part of it as a firm, and personally proud to have played a small role in helping to bring the right result."

--Editing by Aaron Pelc.

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